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PATENT**REMARKS**

Claims 15-17, 19, 20, and 24-32 are currently pending. Applicants respectfully request reconsideration and allowance of claims 15-17, 19, 20, and 24-32.

**35 U.S.C. § 103 Rejections****Claim 15**

Reconsideration of the rejection of claim 15 under 35 U.S.C. §103(a) as being anticipated by Bishoff et al. is respectfully requested.

Claim 15 is directed to:

[a]n aggregation base for use with an apparatus received within a subterranean cavity for detecting and controlling subterranean termites, said aggregation base being attractive to said termites for forming an aggregation site for said termites, said apparatus having a replaceable device sized and shaped such that the device may be removed from the apparatus and replaced without substantially disturbing the aggregation base, said aggregation base comprising:

a **generally cylindrical** outer surface,  
at least one void within said aggregation base for forming an aggregation site for said termites, and  
at least one **channel passing completely through the aggregation base from the cylindrical outer surface and leading inward to said void.**

(emphasis added).

To establish obviousness, every claim element must be taught or suggested by the prior art reference. M.P.E.P. § 2143. But the cited reference fails to teach or suggest every element of claim 15. In particular, Bishoff et al. fail to teach or suggest an aggregation base having a **generally cylindrical outer surface** with at least one **channel passing completely through the aggregation base from the cylindrical outer surface and leading inward to the void.**

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In Fig. 2 of Bishoff et al., a bottom element, or cup, 72 receives a pest baiting device 80 (Fig. 2). The cup 72 has slots 74, allowing pests to gain access to the interior of the cup via an outer wall 81 of the pest baiting device 80. The pest baiting device additionally includes a substantially enclosed channel 82 defined by an inner wall 83 for receiving an elongated member 48 used for extraction of the cup 72. Although pests can gain access to the pest baiting device 80 via the slots 74, Bishoff et al. clearly fail to disclose or suggest any channel passing through the pest baiting device 80 from the outer wall 81 to the enclosed channel 82. Instead, Bishoff et al. teach a pest baiting device 80 having an enclosed channel completely removed from and inaccessible from the outer wall 81 of the pest baiting device 80. To gain access to the enclosed channel 82, a pest must create its own opening in and through the solid outer wall 81 of the pest baiting device 80 toward the enclosed channel by tunneling through the pest baiting device. Bishoff et al. teach a pest baiting device 80 having a solid outer wall 81 with no openings of any kind leading to the enclosed channel 82, while claim 15 requires that at least one channel pass through the aggregation base from the cylindrical outer surface leading to the void. With no teaching or suggestion of an opening of any kind between the solid outer wall 81 and the enclosed channel 82, The disclosure associate with Fig. 2 Bishoff et al. cannot teach each and every element of claim 15.

Moreover, the newly applied disclosure of Fig. 4 of Bishoff et al. cannot render claim 15 obvious. Here, a lower rectangular portion of the housing 112 receives two rectangular wood monitoring devices 122. These rectangular devices sit on a base and are separated by an elongated member 148. The outer surfaces of both the housing 112 and the wood monitoring devices 122 are not cylindrical as required by claim 15, but planar. Without a teaching of a **cylindrical** outer surface, this disclosure cannot render claim 15 obvious. The cylindrical surface of the upper portion of the housing 112 of Bishoff et al. cannot be used as a basis for the present obviousness rejection because the apertures 120 of the upper portion of the housing do not lead to any void (in particular the "void" defined by the Office as between the monitoring devices 122,

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as discussed below). The cylindrical upper portion of the housing cannot be applied to the Office's case for an aggregation base, as this disclosure is completely unrelated to the rectangular devices.

As discussed above, claim 15 specifies details of the cylindrical shape of the outer surface which are not shown or suggested by the cited references. The Office action cites the 1966 case of *In re Dailey*<sup>1</sup> for the proposition that "changes in shape are held to be obvious," but the Federal Circuit held in 1996 that there are no *per se* rules of obviousness.<sup>2</sup> Moreover, it has been held for some time that rejections based on choice of design are improper.<sup>3</sup> *In re Dailey*<sup>4</sup> cannot stand for the proposition that changes in shape are *per se* obvious.

Moreover, there are no channels "passing **completely** through" the aggregation base as required by claim 15. The Office action points to the embodiment of Fig. 4 in Bishoff et al., noting that "[c]onceptually, this embodiment shows two channels from the outer surface going through apertures 120 leading inward to the void."<sup>5</sup> Bishoff et al., however, do not teach or suggest this feature. When assembled, the monitoring devices 122 and elongated member 148 may cooperate to form a pair of spaces between the monitoring devices adjacent the elongated member, but Bishoff et al. do not provide a channel leading to such spaces. In particular, the apertures 120 of the housing 112 end abruptly near the lateral edges of the housing where the two halves of the housing join one another. Thus, where the two halves of the housing join, there are no apertures. This portion of the housing has no channels and is impenetrable to termites. Importantly, this impenetrable portion corresponds to the location of the spaces formed between the monitoring devices, such that no apertures lead from the outer surface inward to the spaces, as is required by claim 15. Bishoff et al. do not

<sup>1</sup> 149 U.S.P.Q. 47 (CCPA 1966).

<sup>2</sup> *In re Ochiai*, 37 U.S.P.Q.2d 1127, 1133 (Fed. Cir. 1996).

<sup>3</sup> *In re Bezombes*, 164 U.S.P.Q. 387, 391 (CCPA 1970).

<sup>4</sup> 149 U.S.P.Q. 47 (CCPA 1966).

<sup>5</sup> July 5, 2005 Office action, page 3, lines 2-4 (emphasis added).

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teach or suggest a channel passing completely through the aggregation base from the cylindrical outer surface and leading inward to the void.

As a result, the cited reference does render claim 15 unpatentable because it fails to teach or suggest at least one channel passing through the aggregation base from the cylindrical outer surface and leading to the void. For at least these reasons, claim 15 is believed to be in condition for allowance. Claims 16, 17, 19, 20, and 24-32, which depend directly or indirectly from claim 15, are also submitted as patentable for the same reasons as claim 15.

**Claim 27**

Reconsideration of the rejection of claim 27 under 35 U.S.C. § 103(a) as being unpatentable over Bishoff et al. is respectfully requested.

Claim 27 is directed to an aggregation base wherein at least three channels in each portion are oriented substantially orthogonal to the cylindrical outer surface. Bishoff et al. and the other references of record fail to disclose this feature of the claimed invention. Figure 2 of Bishoff et al. discloses a bottom element, or cup, 72 with slots 74 extending parallel to the cylindrical outer surface of the cup. Figure 4 of Bishoff et al. fails to disclose a cylindrical outer surface of any kind on the lower portion of the housing 112 (see Applicants' arguments above with respect to claim 15), so this disclosure by Bishoff et al. provides no relevant teaching or suggestion for channels oriented substantially orthogonal to a cylindrical outer surface. As such, the cited reference does not render claim 27 unpatentable because it fails to teach or suggest an aggregation base wherein at least three channels in each portion are oriented substantially orthogonal to the cylindrical outer surface. For at least these reasons, claim 27 is believed to be in condition for allowance. Claim 28, which depends directly from claim 27, is also submitted as patentable for the same reasons as claim 27.

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PATENT**Claim 29**

Reconsideration of the rejection of claim 29 under 35 U.S.C. § 103(a) as being unpatentable over Bishoff et al. is respectfully requested.

Claim 29 is directed to an aggregation base wherein each of the two separable portions is substantially a semi-cylindrical. The Office admits that Bishoff et al. do not disclose an aggregation base having semi-cylindrical portions,<sup>6</sup> but states that such semi-cylindrical portions are obvious in view of the cylindrical pest baiting device 80 of Fig. 2 and argues that changing an integral piece to a separable piece is *per se* obvious.<sup>7</sup> Again, Applicants note that the Federal Circuit has held that there are no *per se* rules of obviousness.<sup>8</sup> Here, the motivation to separate the aggregation base into two semi-cylindrical portions is found only in Applicants' disclosure. Hindsight use of Applicants' disclosure is not proper in rejecting a claim as being obvious. For at least these reasons, claim 29 is believed to be in condition for allowance.

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<sup>6</sup> Id. at page 3, lines 20-21.

<sup>7</sup> In re Dulberg, 129 U.S.P.Q. 348 (CCPA 1961).

<sup>8</sup> In re Ochiai at 1133.

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PATENT**Conclusion**

Reconsideration and allowance of the pending claims is respectfully requested.

If any fees are due, the Commissioner is hereby authorized to charge any under payment or credit any over payment to Deposit Account No. 19-1345.

In view of the foregoing, it is submitted that the claims of this application are in condition for allowance.

If the Examiner wishes to discuss this amendment with the undersigned, please call (314) 231-5400.

Respectfully submitted,



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